

Walk-through of Final Settlements in Administration of Intestate Estates and Wills

Honorable Patrick Davenport

*Probate Judge
Houston County*



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Estates: Post Issuance of Letters

Article 16. Sale of Personal Property
Article 17. Renting and Sale of Real Estate
Article 20. Probate Procedure Act

Judge Patrick H. Davenport
Judge of Probate
Houston County, Alabama
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Devolution of Property

What is the legal concept of devolution of property?



Devolve - to pass something from one person to another (Merriam Webster)

§ 43-2-830. Devolution of estate at death; restrictions.

(a) Upon the death of a person, decedent's **real property** devolves to the persons to whom it is devised by decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of a testate estate, or in the absence of testamentary disposition, to decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates.

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Devolution of Property

§ 43-2-830. Devolution of estate at death; restrictions.

- (b) Decedent's **personal property** devolves to the personal representative to be distributed to:
 - (1) Those persons to whom it is devised by the testator's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of a testate estate; or
 - (2) In the absence of testamentary disposition, to decedent's heirs, or to those indicated as substitutes for them in cases involving renunciations or other circumstances affecting devolution of intestate estates.
- (c) The devolution of a decedent's property, real and personal, is subject to homestead allowance, exempt property, family allowance, rights of creditors, elective share of the surviving spouse, and to administration.

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Devolution of Property

§ 43-2-830. Devolution of estate at death; restrictions.

Case law

Title to the real property on the death of the decedent was held to be in the next of kin, subject to be divested by the administrator, as provided by this section and §§43-2-442 and 43-2-443. Little v. Gavin, 244 Ala. 156, 12 So.2d 549 (Ala.1943).

Realty of persons dying intestate in this state descends to the heirs at law

When decedent died intestate, the legal title to a one-half interest in his real property vested instantly in his son; however, it vested subject to the statutory power of the administratrix to take possession of it and obtain an order to have it sold for payment of the debts of his father's estate. Pennington v. Bigham, 512 So.2d 1344 (Ala.1987).

Realty of persons dying intestate in this state descends to the heirs at law subject to the payments of debts in event personalty is insufficient for that purpose. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

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Devolution of Property

§ 43-2-830. Devolution of estate at death; restrictions.

Commentary

Upon the death of a person, decedent's real property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, disclaimer or renunciation, or other circumstances affecting the devolution of testate estate. In the absence of testamentary disposition, real property devolves to decedent's heirs, or to those indicated as substitutes for them in cases involving disclaimer or renunciation or other circumstances affecting devolution of intestate estates.

Both real and personal property, without preference, are subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

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Article 16. Sale of Personal Property.

§ 43-2-410. Power of sale conferred.

Any part of the personal property of a decedent, including land warrants and choses in action, may be sold only by order of the court, on the written application of the executor or administrator, verified by affidavit, in the following cases, unless, in such cases, power to sell is conferred by the will:

- (1) For the payment of debts. (verified claims filed against estate)
- (2) To make distribution among the distributees or legatees.
- (3) To prevent the waste or destruction of property liable to waste, or of a perishable nature, if it is proved that the sale would be beneficial to the estate.

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Article 16. Sale of Personal Property.

§ 43-2-411. Notice of application.

Notice of such application must be given to some person adversely interested in such manner, and for such length of time, not less than three weeks, as the judge of probate may require; but when the property is perishable, and it is so specified in the application, no notice is required if the judge is satisfied of the truth of the allegations contained in the application.

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Article 16. Sale of Personal Property.

What is perishable?

Method of determining what is perishable property. As to perishable property, all that is necessary to be shown is that the property in the hands of the court is likely to waste or be destroyed by keeping. If it is shown that, by keeping the article, it will necessarily become, or is likely to become, worthless to the creditor, and by consequence to the debtor, then it does not matter what the subject matter is. McCullough v. McCullough, 269 Ala. 417, 113 So.2d 499 (Ala.1959).

Livestock held perishable. It was held that it would be to the benefit of an estate to dispose of livestock because, under the existing circumstances, the livestock could not be taken care of without considerable time and expenditure. Accordingly, the court held that the livestock was perishable. McCullough v. McCullough, 269 Ala. 417, 113 So.2d 499 (Ala.1959).

Sale of perishable property. Where the record shows that application was made for the sale of property of an estate of perishable nature, and that the court was satisfied by proof that the property was of such nature, and that the sales would be beneficial to the estate, the sale was not void. Adkinson v. Wright, 46 Ala. 598 (Ala.1871).



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Article 16. Sale of Personal Property.

What is perishable?

And an averment, in a petition for sale, that the property is "of a character liable to waste or be consumed by fire," is sufficient to sustain the jurisdiction of the court. Harris v. Parker, 41 Ala. 604 (Ala.1868).

Plants and shrubs are perishable. Upon death of one party to arrangement whereby such deceased party furnished capital for greenhouse and nursery business and surviving party was to plant shrubs and plants and to superintend their care and maintenance, court properly ordered sale of the property on petition of executors of the deceased party and over objection of surviving party, on ground that the arrangement was a "joint adventure" and not a "partnership," that the plants and shrubs were perishable and that sale was in the best interests of all parties. Pfingstl v. Solomon, 240 Ala. 58, 197 So. 12 (Ala.1940).



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Article 16. Sale of Personal Property.

§ 43-2-412. Contesting application.

Any person interested may appear and contest such application, and show that no sale is required, or that it is more for the interest of the estate that other property should be sold.



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Article 16. Sale of Personal Property.

§ 43-2-413. Notice of sale.

When the application is granted for the sale of any personal property, the executor or administrator must give notice of the day, place and terms of sale, and a description of the property to be sold, by advertisement for three successive weeks in some newspaper published in the county where the sale is to take place, or, by posting notice at the courthouse door and at three other public places in the county. But when the property is perishable, or the expense of keeping it is very great, the sale may be made after five days' notice, which may be given by one insertion in a newspaper published in the county where the sale is to take place, or, if there be no such paper, by posting at the courthouse door, and at three other public places in the county. In addition to the notice prescribed in this article, the court may direct the giving of notice by printed handbills, or posters, to be distributed and posted in the manner best calculated to give extended notice of the sale.

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Article 16. Sale of Personal Property.

- **Best Practices**
 - Include language in Order Granting Letters of Administration prohibiting sale of personal property without court order.
 - Create a checklist for Sale of Personal Property so that clerks and attorneys know what should be included in the petition.
- **Pitfalls**
 - Personal Representative may sell without first seeking a court order.
 - Personal Representative may only sell for reasons specified in §43-2-410.

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-440. Renting of lands.

The executor or administrator may rent the decedent's lands at public outcry, or, when the interest of the estate requires it, privately; and such rent is assets; but when lands are rented privately, he must report such renting to the probate court of the proper county within 30 days thereafter.



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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

Lands may be sold by the executor or by the administrator with the will annexed, for the payment of debts, when the will gives no power to sell the same for the purpose.



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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

Case law

When personalty is insufficient the duty to sell the realty is mandatory. The duty to make sale of realty where there is insufficiency of personalty is mandatory, and it is the administrator's duty to intercept the rents and sell the land if need be to pay the creditors. Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (Ala.1924).

His right to sell is wholly statutory. An administrator's right to maintain a petition to sell lands of the intestate to pay debts is wholly statutory, and can be maintained by the administrator alone, in the manner and on the conditions prescribed. Kirkbride v. Kelly, 167 Ala. 570, 52 So. 660 (Ala.1910).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

Case law

Right of representative to sell realty for payment of debts has priority over claims of heirs to realty. When there is insufficient personal property for the payment of the debts of an estate, the executor has the sole and exclusive right to sell the real estate for the payment of the debts, and a complaint for sale of real estate and division of proceeds, filed in circuit court by a devisee who is not the executor under the will, does not take priority, because of an earlier filing, over a petition for sale of personal and real estate for payment of debts and division, alleging insufficiency of personal property for payment of debts. Hamilton v. Mayer, 345 So.2d 1334 (Ala.1977).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

Case law

This jurisdiction attaches only when petition sets out grounds for sale. Jurisdiction attaches when a petition stating a statutory ground for the order of sale is regularly filed and recognized by the order of the court. And this though parties in interest may not be personally notified of the pendency of the proceedings. Howell v. Hughes, 168 Ala. 460, 53 So. 105 (Ala.1910).

No title passes when the petition is insufficient. A purchaser of lands at a sale under a probate decree, founded on a petition by an executor or administrator which does not contain averments necessary to give the court jurisdiction, acquires no legal title, and can convey none to a subpurchaser, but he may acquire an equity, enforceable against the heirs, if they receive their share of the purchase money paid. Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am.St.Rep. 768 (Ala.1887).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

Case law

Existence of power under will must be negated by petition. A petition in the probate court, for a sale under this section, must negative the existence of a power of sale in the will, and a decree of sale on a petition failing to allege that fact is void. Howell v. Hughes, 168 Ala. 460, 53 So. 105 (Ala.1910).

Cannot order sale when it may be done under will. A court of probate cannot order a sale of property to pay debts when it may be done under the power in a will. Riley v. Wilkinson, 247 Ala. 231, 23 So.2d 582 (Ala.1945).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-441. Authorization to sell -- Where will exists.

- **Best Practices**
 - Acknowledge power to sell or lack thereof before issuing letters.
 - Make sure PR and attorney understand that court order is required if will does not grant power to sell.
- **Pitfalls**
 - Personal Representatives sell without court authority.
 - Court can only authorize sale for two reasons: payment of debts or division.

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-442. Authorization to sell -- In case of intestacy.

In case of intestacy, lands may be sold by the administrator for the payment of debts (verified claims filed against estate).

Case law

Duty is mandatory. The duty of an administrator to sell realty for payment of debts in case personalty is insufficient is "mandatory." Moebe v. Kay, 241 Ala. 294, 2 So.2d 754 (1941); Dorrough v. McKee, 264 Ala. 663, 89 So.2d 77 (1956).

When there are debts of an estate and the personalty is insufficient to satisfy said debts, it is mandatory that the administrator sell the lands of the estate to pay said debts. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (1957) Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (1962).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-442. Authorization to sell -- In case of intestacy.

Case law

The right of an administrator to sell land to pay debts of his intestate is wholly statutory, and he alone can do so on the conditions and in the manner prescribed by this section. Austin v. Eyster, 242 Ala. 402, 6 So.2d 892 (1942) Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (1957).

If there was an original deficiency of personal assets for the payment of debts, then under the very terms of this section a sale of the realty is due as a matter of course, or, if these assets have become unavailing from depreciation or loss through no fault of the administrator or creditor, the realty may be sold, the result being the same as if there had been an original lack of personalty. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-442. Authorization to sell -- In case of intestacy.

Case law

Debt of estate

Absent a timely claim against estate by mortgagee, real property that was inherited by intestate decedent's minor children subject to a mortgage could not be ordered by probate court to be sold to satisfy the mortgage because mortgage was not a debt of the estate. Schlumpf v. D'Olive, 203 So.3d 57 (Ala.2016).



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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-442. Authorization to sell -- In case of intestacy.

- **Best Practices**
 - Be sure personal representative and attorneys know that a court order is required in intestate estate
- **Pitfalls**
 - Closing set within 30 days of the petition
 - Petition doesn't state reason for sale
 - Reason for sale is not for payment of debts or division
- **Examples**
 - Closing set day after petition filed. Sale lost because hearing required not less than 30 days from petition.
 - Mortgage not considered debt of estate if claim against estate not filed.

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-443. Authorization to sell -- Sale for division.

Lands of an estate may be sold by order of the probate court having jurisdiction of the estate when the same cannot be equitably divided among the heirs or devisees, when an adult heir or devisee files his written consent that the land be sold.

Case law

Initial procedure

Order of probate court for sale of land without written consent of adult heir or devisee was void. Forman v. McAnear, 219 Ala. 157, 121 So. 538 (1929); Dawkins v. Hutto, 222 Ala. 132, 131 So. 228 (1930).

Petition may be filed by administrator together with one or more heirs. A petition contemplating a sale of real estate for division among the joint owners, including a distribution among the heirs of an intestate, may properly be filed by the administrator, together with one or more of the heirs of the intestate. McGowin v. Robinson, 251 Ala. 690, 39 So.2d 237 (Ala.1949).

Intestate must have title at death. Under this section the probate court has no jurisdiction to order the sale of land, the title to which intestate did not have at the time of his death, but which was taken after his death, in the name of the heirs, by the administrator who paid the balance of the purchase price out of the funds of the estate. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (Ala.1892).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-443. Authorization to sell -- Sale for division.

Best Practices

- Create a checklist for clerks and attorneys

Pitfalls

- To sell for division, there must be more than one heir.
- Closing set within 30 days of petition
- Petition doesn't specify reason for sale
- Must include consent of adult heir



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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-444. Application for sale.

The application for the sale of lands, either for payment of debts or for division, must be made by the executor or administrator in writing, verified by affidavit, to the probate court having jurisdiction of the estate, must describe the lands accurately, must give the names of the heirs or devisees, and their places of residence and must also state whether any, and which of such heirs or devisees, are under the age of 19 years or of unsound mind; and such application may be contested by any party interested in the estate.

Case law

Purpose of this section. The purpose of this section is to require such a description of the land in the application that a decree can be rendered therein that will be so exact and accurate that a purchaser at a sale thereunder will know from the proceedings just what land he bought. Little v. Marx, 145 Ala. 620, 39 So. 517 (Ala.1905).

Filing of application by administrator is mandatory. Unless the application is filed by the executor or administrator the probate court acquires no jurisdiction. Bolen v. Hoven, 143 Ala. 652, 39 So. 379 (Ala.1905).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-444. Application for sale.

Case law

Sufficiency of description of lands. Jurisdiction in a proceeding under this section is founded on the petition, and it does not attach where the land is not described with sufficient certainty. Kornegay v. Mayer, 135 Ala. 141, 33 So. 36 (Ala.1902).

Petition must show residence and status of heirs. It is reversible error where the petition fails to state the places of residence of heirs as herein required, and whether they are minors or married women. Bozeman v. Bozeman, 82 Ala. 389, 2 So. 732 (Ala.1887).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-444. Application for sale.

Best Practices

- Template petition
- Create a checklist that includes all required allegations

Pitfalls

- Petitions rarely include all requirements

Examples

- Petition fails to state reason for sale or list names of heirs or devisees. Failure to include this required information slows down the process for the petitioner.

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-445. Notice and hearing generally; time for hearing; appointment of guardian ad litem.

- (a) The court must appoint a day, not less than 30 days from the time of making such application, for the hearing thereof, and must appoint a proper person, not a petitioner or of kin to a petitioner, as a guardian ad litem, to represent the minors or persons of unsound mind, if any there be, and must issue a citation to the heirs or devisees of full age, and residing in this state, notifying them of the application, and the day appointed for hearing the same, which must be served on them 10 days before the day appointed for the hearing.
- (b) If such application be for the sale of land for the payment of debts, notice must also be given by publication, once a week for three successive weeks, in some newspaper published in the county, or by posting up notice at the courthouse door and three other public places in the county, at the discretion of the court. If no newspaper is published in the county, notices must be posted as above prescribed.

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-445. Notice and hearing generally; time for hearing; appointment of guardian ad litem.

Case law

Lack of notice. The failure to give notice as herein prescribed will not render the proceedings void on collateral attack. Lyons v. Hamner, 84 Ala.197, 4 So. 26, 5 Am.St.Rep. 363 (Ala.1888) This because the proceedings are in rem. See on this point notes to §43-2-441.

Pitfalls

- Closing set within 30 days of petition
- Attorneys want immediate order

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-450. Order of sale for payment of debts.

On the hearing of such application, and when the application is by an executor or administrator with the will annexed, that no power is given by the will for that purpose, the court may direct the sale of all, or such portion of the real estate as may be necessary to pay the debts; and such sale may be had on such credit as the court may direct, not exceeding two years.

Case law

Sale must be of decedent's entire interest in parcel sold. The legislature intended by this section and §43-2-464 to empower the judge of probate to sell a part or parcel of the realty of a decedent's estate when the debts owed by the estate were not enough to require the sale of all the realty owned by the deceased at the time of his death, but the judge of probate can only authorize the sale of the entire interest which the decedent had in that part or parcel to be sold. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

Court may not sell lands reserving mineral interest. The probate court was without statutory authority to sell the lands reserving the mineral interest to the heirs. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

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Article 17. Renting and Sale of Real Estate.

Division 1. For Payment of Debts and for Division.

§ 43-2-450. Order of sale for payment of debts.

Best Practices

- Create a checklist for clerks and attorneys

Pitfalls

- There must be debts in the form of verified claims filed against the estate
- Mortgage is not a debt of estate unless mortgagee
- Petition does not state reason for sale



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Article 20. Probate Procedure Act.

§ 43-2-830. Devolution of estate at death; restrictions. (previously discussed)

§ 43-2-835. Duty of personal representative; inventory and appraisalment.

- (a) Within two months after appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall file an inventory of property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.
- (b) The personal representative shall send a copy of the inventory to interested persons who request it. If the testator, by express provision in the will to that effect, exempts the personal representative from filing an inventory, the personal representative shall not be required to file the initial inventory, or any supplement thereto, with the court, unless in the opinion of the court, the estate is likely to be wasted, to the prejudice of any interested person.

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Article 20. Probate Procedure Act.

§ 43-2-835. Duty of personal representative; inventory and appraisalment.

Case law

Filing of inventory

Any provision of a will purporting to exempt the personal representative from filing an inventory must specifically speak to that requirement. Green v. Estate of Nance, 971 So.2d 38 (Ala.Civ.App.2007).



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Article 20. Probate Procedure Act.

§ 43-2-835. Duty of personal representative; inventory and appraisement.

Best Practices

- Include order directing the filing of an inventory in the order granting letters
- Provide a sample inventory
- Provide a handbook that sets forth all statutory requirements. Require PR sign off on handbook.

Pitfalls

- Personal Representatives often confuse inventories and annual accountings
- Personal Representatives often fail to include value of the assets listed on the inventory

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Article 20. Probate Procedure Act.

§ 43-2-836. Duty of personal representative; supplementary inventory.

If any property not included in the initial inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the initial inventory for any item is erroneous or misleading, the personal representative shall make a supplement to the initial inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the initial inventory was filed, or furnish copies thereof to persons interested in the new information.

Best Practices

- An amended inventory could trigger a bond increase.
- Make sure amended inventory is addressed in Order Granting Letters.

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Article 20. Probate Procedure Act.

§ 43-2-837. Duty of personal representative; possession of estate.

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. A request in writing by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, receive the income therefrom, and pay the expenses reasonably necessary for the management, protection, and preservation of, the estate in the possession of the personal representative. The personal representative may maintain an action to recover possession of property or to determine the title thereto.

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Article 20. Probate Procedure Act.

§ 43-2-843. Transactions authorized for personal representatives; exceptions. This Code section sets forth the actions an administrator may take without court approval

This Code section sets forth the actions an administrator may take without prior court approval.

Case law

Under Alabama law, personal representative has power to exercise the same power over property of probate estate that an absolute owner would have. In re Eldridge, 348 B.R. 834 (Bkrcty.N.D.Ala.2006).

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Article 20. Probate Procedure Act.

§ 43-2-843. Transactions authorized for personal representatives; exceptions.

Attorney General's Opinion

Probate Courts - Administrators and Executors - Personal Representative - Relatives - Fiduciaries

A personal representative has a duty to use reasonable diligence to ascertain potential heirs. An administrator, as a personal representative, may employ an heir-finding service to fulfill this duty under section 43-2-843(17) of the Code of Alabama. The cost of an heir-finding service must be paid directly from the estate and not from the distributable shares under section 43-2-371 of the Code of Alabama.

Ala. Op. Att'y Gen. No. 2009-104 (Sept. 11, 2009)

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Article 20. Probate Procedure Act.

§ 43-2-843. Transactions authorized for personal representatives; exceptions.

Best Practices

- Include this entire Code section in Letters of Administration
- Clearly state any exceptions in the Letters



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Article 20. Probate Procedure Act.

§ 43-2-844. Transactions authorized for personal representatives; prior court approval.

Unless expressly authorized by the will, a personal representative, only after prior approval of court, may:

- (1) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset.
- (2) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings.
- (3) Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration.
- (4) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term of more than one year.

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Article 20. Probate Procedure Act.

§ 43-2-844. Transactions authorized for personal representatives; prior court approval.

- (5) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.
- (6) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for any unpaid balance.
- (7) Pay compensation of the personal representative.

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Article 20. Probate Procedure Act.

§ 43-2-844. Transactions authorized for personal representatives; prior court approval.

Case law

Payment of compensation to personal representative

Claim by daughters of deceased seeking interest from personal representatives for compensation payments made by personal representatives to themselves prior to obtaining court approval in estate administration was not barred by equitable estoppel, where, in making payments to themselves without obtaining prior court approval, the personal representatives violated their statutory duty, and estate-tax return received by daughters described the amount the personal representatives intended to claim as compensation, not amount they have already paid themselves. Wehle v. Bradley, 195 So.3d 928 (Ala.2015).

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Article 20. Probate Procedure Act.

§ 43-2-844. Transactions authorized for personal representatives; prior court approval.

Best Practices

- Include this entire Code section in Letters of Administration
- Clearly state any exceptions in the Letters



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Article 20. Probate Procedure Act.

§ 43-2-848. Compensation of personal representative.

- (a) A personal representative is entitled to reasonable compensation for services as may appear to the court to be fair considering such factors that may include, but are not limited to, the novelty and difficulty of the administrative process, the skill requisite to perform the service, the likelihood that the acceptance of the particular employment will preclude other employment, the fee customarily charged in the locality for similar services, the amount involved and the results obtained, the requirements imposed by the circumstances and condition of the estate, the nature and length of the professional relationship with the decedent, the experience, reputation, diligence, and ability of the person performing the services, the liability, financial or otherwise, of the personal representative, or the risk and responsibility involved, which shall not exceed two and one-half percent of the value of all property received and under the possession and control of the personal representative and two and one-half percent of all disbursements.
- (b) In addition the court may allow a reasonable compensation for extraordinary services performed for the estate.

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Article 20. Probate Procedure Act.

§ 43-2-848. Compensation of personal representative.

- (c) If a will provides for compensation, or no compensation, of the personal representative either directly or conditionally and there is no contract with the decedent regarding compensation, the personal representative may renounce the provisions and if no alternate or successor personal representative is willing to serve for the compensation provided in the will for the personal representative, the personal representative in the order of priority provided in the will shall be entitled to reasonable compensation. A personal representative also may renounce the right to all or any part of the compensation. A renunciation may be filed with the court.
- (d) Nothing in this section shall be construed to limit the right of a decedent or all affected beneficiaries to agree in writing with the personal representative, as to the amount or the method of determining the personal representative's compensation, which shall be binding on all parties if the appointment is accepted and the agreement is not unconscionable.

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Article 20. Probate Procedure Act.

§ 43-2-848. Compensation of personal representative.

Case law

Amount of commission

Compensation of \$1,964,367.82 to personal representatives in estate administration was reasonable, where the estate was valued at more than \$35,000,000 at time of deceased's death, estate contained some unusual assets, including competition-trained hunting dogs, partial ownership interests in thoroughbred horses, and artwork, estate included business entities owned by deceased, estate plan incorporated multiple trusts, there was evidence that deceased desired personal representatives receive "the 5% maximum" for their services, total receipts of the estate (assets and income during administration) through the time of final settlement were \$40,477,724.08 and the total disbursements were \$40,452,262.23, and maximum statutory fee trial court could have awarded the personal representatives was \$2,023,249.66. Wehle v. Bradley, 195 So.3d 928 (Ala.2015).

Personal representative of intestate decedent's estate was not entitled to receive personal representative fees in his action for sale for division of decedent's real property, which was separate civil action from administration of estate, inasmuch as personal representative's possession of real property was not needed for estate administration or for payment of debts, and therefore personal representative was not in possession or control of decedent's real property, so as to meet statutory requirements for fee, and services he performed did not benefit estate. Self v. Roper, 689 So.2d 139 (Ala.Civ.App.1996).

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Article 20. Probate Procedure Act.

§ 43-2-848. Compensation of personal representative.

Case law

Executrix was entitled to compensation of \$925.58 for services rendered to estate, even though executrix had originally requested \$5,800.00 in fees; statute limited compensation to "two and one-half percent of the value of all property received and under the possession and control of the personal representative and two and one-half percent of all disbursements," the total of all the property in the estate was \$18,511.46, two and one-half percent of \$18,511.46 was \$462.79, and the figure was doubled to account for both property received and disbursements. Cashion v. Torbert, 885 So.2d 745 (Ala.2003).

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Article 20. Probate Procedure Act.

§ 43-2-848. Compensation of personal representative.

Case law

Statutes governing a personal representative's fee for ordinary services and for extraordinary services are the exclusive statutory authorizations for determining a personal representative's compensation. *Ex parte Rodgers*, 141 So.3d 1038 (Ala.2013), rehearing denied, on remand 141 So.3d 1046.

The extent to which an executor should be compensated rests in the sound discretion of the court and is to be determined in view of all the circumstances of the case. *Ruttenberg v. Friedman*, 97 So.3d 114 (Ala.2012).

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Article 20. Probate Procedure Act.

§ 43-2-851. Bond.

- (a) The court must require a personal representative or special administrator to furnish bond payable to the judge of probate conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond must be in the amount of the aggregate capital value of the property of the estate in the personal representative's control, plus one year's estimated income, and minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, pursuant to Section 43-2-844, lacks power to sell or convey without court authorization. The court, in lieu of sureties on a bond, may accept other collateral for the performance of the bond, including a pledge of securities or any other assets or a mortgage of land.
- (b) The court may at any time reduce the bond of the personal representative or require the personal representative to provide additional or larger bond as may seem to be proper or necessary to protect the estate and the interests of persons interested in the estate.

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Article 20. Probate Procedure Act.

§ 43-2-851. Bond.

- (c) Any individual, who is authorized under Chapter 2 of Title 43, to nominate a personal representative by will, may, by express provision in the will, exempt the personal representative from giving bond; and when a provision to that effect is made, the bond must not be required except in the following cases:
- (1) When any guardian, conservator, guardian ad litem, other fiduciary, or any person interested in the estate of the decedent makes an affidavit, showing the affiant's interest and alleging that the interest is, or will be, endangered for want of security.
 - (2) When, in the opinion of the court, on its own motion, the estate is likely to be wasted, to the prejudice of any person interested therein.
- (d) In the cases provided for by subsection (c), upon application for the personal representative to give bond, the personal representative may show cause against applications of the exceptions and must have notice as the court may deem reasonable; but if the personal representative is not in the state, the application may be heard and determined without notice.

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Article 20. Probate Procedure Act.

§ 43-2-851. Bond.

Case law

Probate court must, unless waived by the terms of the will, require a personal representative to post a bond. Thames v. Thames, 183 So.3d 168 (Ala.Civ.App.2015).

Sufficiency of bond

Decedent's children, objecting to decedent's widow's appointment as personal representative of decedent's estate after executor named in will declined to serve, failed to establish that bond posted by widow was insufficient; children made no attempt to demonstrate through calculations the alleged insufficiency of the bond, and probate court was authorized to increase or reduce the bond required at any time. Thames v. Thames, 183 So.3d 168 (Ala.Civ.App.2015).

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Article 20. Probate Procedure Act.

§ 43-2-851. Bond.

Best Practices

- Set a minimum bond amount
- Withhold letters until bond filed
- If inventory is amended, if needed, modify bond

Pitfalls

Probate Judge is personally liable

§ 43-2-82. Liability of judge of probate, etc., in taking bond.

When a party is required to give a bond and is not otherwise exempt from giving a bond, the judge of probate is liable for any wanton, fraudulent, or intentional misconduct for not requiring a bond or for taking an insufficient bond from any personal representative, fiduciary, or someone serving in a similar capacity. Any person injured thereby may maintain an action against the judge and his or her sureties and recover for the injury proved.

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Article 16. Sale of Personal Property.

§ 43-2-410. Power of sale conferred.

Jurisdiction to order a sale of personal property is derived solely from the section, and is special and limited. Hall v. Chapman's Adm'rs, 35 Ala. 553 (Ala.1860).

A sale without order of the court is invalid. Wyatt v. Rambo, 29 Ala. 510 (1857) The record must show every fact essential to the jurisdiction. Pettit v. Pettit, 32 Ala. 288 (1858) Beene v. Collenberger, 38 Ala. 647 (1863).

The administrator of an insolvent estate cannot sell land or personalty of the estate without an order of the court. Batson v. Etheridge, 239 Ala. 535, 195 So. 873 (Ala.1940).

Direction in will for sale is no ground for such order by court. In view of this section the fact that decedent's will directs the sale of his property is no ground for an order of sale by the probate court, and can give no validity thereto. Wilson v. Armstrong, 42 Ala. 168, 94 Am.Dec. 635 (Ala.1868) See also. Alabama Conference v. Price, 42 Ala. 39 (1868); Chandler v. Chandler, 87 Ala. 300, 6 So. 153 (1889).

Petition must show cause for sale

An application by an administrator for an order to sell certain described personal property left by his intestate, which alleges that in his opinion a sale of the property is necessary to pay the debts of the intestate, is sufficient to confer jurisdiction upon the probate court. Reynolds v. Kirkland, 44 Ala. 312 (Ala.1870).

Petition must show cause for sale. The court has no jurisdiction to make an order for the sale of personal property, when the petition of the administrator does not allege or show the existence of a legal cause for the sale, and such an order is a nullity. Hall v. Chapman's Adm'rs, 35 Ala. 553 (Ala.1860). See also Wyatt v. Rambo, 29 Ala. 510 (1857); King v. Kent, 29 Ala. 542 (1857); Ikelheimer v. Chapman, 32 Ala. 676 (1858); Hatcher v. Clifton, 33 Ala. 301 (1858).

Judgment creditor is not entitled to petition for sale. A judgment creditor is not entitled to file a petition for the sale of decedent's personal property. But where the administrator joins in the petition the sale will not be void. Howell v. Randle, 171 Ala. 451, 54 So. 563 (Ala.1911).

Mere irregularities in primary proceedings will not void sale. Mere irregularities in proceedings leading up to a decree for a sale of property by a probate court are not sufficient to avoid the decree upon the ground of want of jurisdiction. Carter v. Waugh, 42 Ala. 452 (1868); Gartman v. Lightner, 160 Ala.202, 49 So. 412 (1908). See also Satcher v. Satcher, 41 Ala. 26 (1867).

Method of determining what is perishable property. As to perishable property, all that is necessary to be shown is that the property in the hands of the court is likely to waste or be destroyed by keeping. If it is shown that, by keeping the article, it will necessarily become, or is likely to become, worthless to the creditor, and by consequence to the debtor, then it does not matter what the subject matter is. McCullough v. McCullough, 269 Ala. 417, 113 So.2d 499 (Ala.1959).

Livestock held perishable. It was held that it would be to the benefit of an estate to dispose of livestock because, under the existing circumstances, the livestock could not be taken care of without considerable time and expenditure. Accordingly, the court held that the livestock was perishable. McCullough v. McCullough, 269 Ala. 417, 113 So.2d 499 (Ala.1959).

Sale of perishable property. Where the record shows that application was made for the sale of property of an estate of perishable nature, and that the court was satisfied by proof that the property was of such nature, and that the sales would be beneficial to the estate, the sale was not void. Adkinson v. Wright, 46 Ala. 598 (Ala.1871).

And an averment, in a petition for sale, that the property is "of a character liable to waste or be consumed by fire," is sufficient to sustain the jurisdiction of the court. Harris v. Parker, 41 Ala. 604 (Ala.1868).

Such sale should be made immediately. It is the duty of an administrator, on obtaining an order of sale, to sell the perishable property without delay, and if he fails to do so, and retains it until it deteriorates in value, he is chargeable with its value at the time it should have been sold. Steele v. Knox, 10 Ala. 608 (Ala.1846).

Nursery business a "joint adventure". Upon death of one party to arrangement whereby such deceased party furnished capital for greenhouse and nursery business and surviving party was to plant shrubs and plants and to superintend their care and maintenance, court properly ordered sale of the property on petition of executors of the deceased party and over objection of surviving party, on ground that the arrangement was a "joint adventure" and not a "partnership," that the plants and shrubs were perishable and that sale was in the best interests of all parties. Pfingstl v. Solomon, 240 Ala. 58, 197 So. 12 (Ala.1940).

And properly ordered sold as perishable property. Where executors of deceased party to joint adventure relating to greenhouse and nursery business sought to have court order sale of the property, court was not limited by this section, authorizing sale of perishable property of a decedent, but its jurisdiction was more extensive in scope and was based on its traditional powers to consider the joint adventure contract and the circumstances and to exercise its discretion in the best interests of all the parties. Pfingstl v. Solomon, 240 Ala. 58, 197 So. 12 (Ala.1940).

Title not in representative. Whorton v. Moragne, 62 Ala.201 (Ala.1878). The probate court has no jurisdiction to order a sale of personal property at the instance of a personal representative, where the title in him, which devolved upon him at the death of his testator or intestate, has been divided by his assent to a legacy.

Article 17. Renting and Sale of Real Estate.

§ 43-2-440. Renting of lands.

Claim of the executor to lands dominates that of the heir

Thus, this section authorizes the personal representative to intercept the possession of the heir or devisee to the real estate for the payment of debts. Powell v. Labry, 210 Ala. 248, 97 So. 707 (Ala.1923). See also Wright v. Watson, 96 Ala. 536, 11 So. 634 (1892).

Claim of the executor to lands dominates that of the heir. The power given by this section shows that the claim of the executor to the lands of the decedent dominates that of the heir. Griffith v. Rudisill, 141 Ala.200, 37 So. 83 (Ala.1904).

But in order to recover lands from the heirs or devisees it must affirmatively appear that there is a necessity therefor

Under the statutes the administrator may if advisable intervene, and by taking the necessary steps become the landlord, and collect the rents. Kelly v. Kelly, 250 Ala. 664, 35 So.2d 686 (Ala.1948).

But in order to recover lands from the heirs or devisees it must affirmatively appear that there is a necessity therefor under this article. Layton v. Hamilton, 214 Ala. 329, 107 So. 830 (Ala.1926).

Security need not be taken for rent. Under this section an executor may rent lands without demanding security for the rent. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 So. 777, 54 Am.St.Rep. 131 (Ala.1895).

Reasonable diligence and fair judgment is required of representative. Under this section the personal representative is bound only to reasonable diligence and the exercise of fair judgment in making rents. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 So. 777, 54 Am.St.Rep. 131 (Ala.1895).

§ 43-2-441. Authorization to sell -- Where will exists.

When personalty is insufficient the duty to sell the realty is mandatory. The duty to make sale of realty where there is insufficiency of personalty is mandatory, and it is the administrator's duty to intercept the rents and sell the land if need be to pay the creditors. Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (Ala.1924).

And in these proceedings the administration represents the creditors as opposed to the heirs. Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (Ala.1924).

Or the widow claiming to retain the lands until dower is assigned. Clark v. Knox, 70 Ala. 607, 45 Am.Rep. 93 (Ala.1881).

Only the representative may apply to sell realty

An heir cannot maintain a petition for the sale of the intestate's real estate to pay debts. Martin v. Williams, 18 Ala.190 (1850); Chighizola v. Le Baron, 21 Ala. 406 (1852); Kirkbride v. Kelly, 167 Ala. 570, 52 So. 660 (1910).

Only the representative may apply to sell realty. The right to prefer the application to have lands sold to pay debts devolves alone upon the personal representative. Henley v. Johnston, 134 Ala. 646, 32 So. 1009 (1902); Bolen v. Hoven, 143 Ala. 652, 39 So. 379 (1905). Therefore, it is essential that his appointment as administrator de bonis non be valid. Henley v. Johnston, 134 Ala. 646, 32 So. 1009, 92 Am.St.Rep. 48 (Ala.1902). As to appointment of administrator de bonis non, see §43-2-272 and notes thereto.

His right to sell is wholly statutory. An administrator's right to maintain a petition to sell lands of the intestate to pay debts is wholly statutory, and can be maintained by the administrator alone, in the manner and on the conditions prescribed. Kirkbride v. Kelly, 167 Ala. 570, 52 So. 660 (Ala.1910).

Right of representative to sell realty for payment of debts has priority over claims of heirs to realty. When there is insufficient personal property for the payment of the debts of an estate, the executor has the sole and exclusive right to sell the real estate for the payment of the debts, and a complaint for sale of real estate and division of proceeds, filed in circuit court by a devisee who is not the executor under the will, does not take priority, because of an earlier filing, over a petition for sale of personal and real estate for payment of debts and division, alleging insufficiency of personal property for payment of debts. Hamilton v. Mayer, 345 So.2d 1334 (Ala.1977).

The proceedings under this section are in rem. Since the decision of Wyman v. Campbell, 6 Port. 219 (1838), the supreme court has uniformly held to the doctrine that proceedings in the probate court for the sale of lands of an estate for the payment of debts are in the nature of proceedings in rem. DeBardelaben v. Stoudenmire, 48 Ala. 643 (1872); Lyons v. Hamner, 84 Ala.197, 4 So. 26 (1887); Howell v. Hughes, 168 Ala. 460, 53 So. 105 (1910); Johnson v. Gartman, 173 Ala. 290, 55 So. 906 (1911).

It has been held that it is error to decree a sale of the land of a decedent without the previous appointment of a guardian ad litem for the infant heirs. Taylor v. Reese, 4 Ala. 121 (1842); Craig v. McGehee, 16 Ala. 41 (1849).

But in Neville v. Kenney, 125 Ala. 149, 28 So. 452, 82 Am.St.Rep. 230 (Ala.1900), the court held that where complainant, a minor heir, was not made a party to the proceedings, and no guardian ad litem was appointed for her, this did not invalidate the sale as to her, since the proceedings were in rem.

An application to a court of probate for an order to sell land of a decedent for the payment of debts, when collaterally assailed, is regarded as a proceeding in rem, and jurisdiction of the thing, not of persons is the controlling element of its validity, but, when the regularity of the proceeding is presented on error or by appeal, it is regarded as in personam. Garrett v. Bruner, 59 Ala. 513 (Ala.1877).

The jurisdiction of the court is special and limited. The jurisdiction of the probate court to order a sale of lands for the payment of debts is statutory, special and limited. Hall v. Chapman, 35 Ala. 553 (1860); Robertson v. Bradford, 70 Ala. 385 (1881); Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (1957). It cannot be presumed on appeal but must appear from the record. Pettus v. McClannahan, 52 Ala. 55 (1875); Wilburn & Co. v. McCalley, 63 Ala. 436 (1879); Tyson v. Brown, 64 Ala. 244 (1879); Howell v. Hughes, 168 Ala. 460, 53 So. 105 (1910).

This jurisdiction attaches only when petition sets out grounds for sale. Jurisdiction attaches when a petition stating a statutory ground for the order of sale is regularly filed and recognized by the order of the court. And this though parties in interest may not be personally notified of the pendency of the proceedings. Howell v. Hughes, 168 Ala. 460, 53 So. 105 (Ala.1910).

No title passes when the petition is insufficient. A purchaser of lands at a sale under a probate decree, founded on a petition by an executor or administrator which does not contain averments necessary to give the court jurisdiction, acquires no legal title, and can convey none to a subpurchaser, but he may acquire an equity, enforceable against the heirs, if they receive their share of the purchase money paid. Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am.St.Rep. 768 (Ala.1887).

Where a decedent's land was sold by an administrator under a void order, the circuit court, at the instance of the purchaser, or one claiming under him, to whom the administrator and sole heir conveyed a legal title, will by injunction prevent the cloud on the title caused by a second sale by an administrator de bonis non under a probate court order. Bell v. Craig, 52 Ala. 215 (Ala.1875).

Cannot order sale when it may be done under will. A court of probate cannot order a sale of property to pay debts when it may be done under the power in a will. Riley v. Wilkinson, 247 Ala. 231, 23 So.2d 582 (Ala.1945).

Existence of power under will must be negated by petition

This has been repeatedly held both in the case of a direct attack upon the decree of the court, McCollum v. McCollum, 33 Ala. 711 (1859); Alabama Conference v. Price, 42 Ala. 39 (1868); Meadows v. Meadows, 73 Ala. 356 (1882); and in the case of a collateral attack. Hall v. Hall, 47 Ala. 290 (1872); Brock v. Frank, 51 Ala. 85 (1874); Arnett v. Bailey, 60 Ala. 435 (1877).

Existence of power under will must be negated by petition. A petition in the probate court, for a sale under this section, must negative the existence of a power of sale in the will, and a decree of sale on a petition failing to allege that fact is void. Howell v. Hughes, 168 Ala. 460, 53 So. 105 (Ala.1910). See also Moore v. Cottingham, 113 Ala. 148, 20 So. 994 (1896).

No sale of realty when there are no debts or personalty is sufficient

Or, as stated in Powell v. Labry, 210 Ala. 248, 97 So. 707 (Ala.1923).

A deficiency in the assets of an estate caused by maladministration or devastavit will not justify a sale of lands to pay debts. Spear v. Banks, 114 Ala. 323, 21 So. 834 (Ala.1897).

No sale of realty when there are no debts or personalty is sufficient. The lands of a decedent will not be ordered sold for the payment of debts when there are no debts or when there are sufficient personal assets for their payment. Banks v. Speers, 97 Ala. 560, 11 So. 841 (Ala.1892).

These debts must exist at time of death

The jurisdiction does not extend to sales for the payment of debts contracted by the administrator. Beadle v. Steele, 86 Ala. 413, 5 So. 169 (1888); Bolen v. Hoven, 143 Ala. 652, 39 So. 379 (1905).

The lands of a decedent are chargeable under this section with debts owing by decedent at the time of his death, but not for costs and expenses of administration, Turley v. Hazelwood, 234 Ala.186.

These debts must exist at time of death. Probate courts possess no power to order sale of land belonging to a decedent's estate, except for the payment of debts in existence at the date of his death. Beadle v. Steele, 85 Ala. 413, 5 So. 169 (Ala.1888).

Until the period for presenting claims has elapsed necessity for sale is indeterminable. Until the lapse of the period for the presentation of claims against the estate, it cannot be determined whether there is a real necessity to divert the possession of the real estate. And during the period for presenting claims (see §§43-2-350 through 43-2-352) it is within the sound discretion of a personal representative to determine whether or not it is necessary. Powell v. Labry, 210 Ala. 248, 97 So. 707 (Ala.1923).

Intestate must have claim to estate before sale will be ordered. The probate court has no jurisdiction to order the sale of land for the purpose of its distribution, under the petition of an administrator which alleges that it is of the estate of his intestate, when the latter had no claim to it whatever at the time of his death. Bishop v. Blair, 36 Ala. 80 (Ala.1860). See also Johnson v. Collins, 12 Ala. 322 (1847); McCain v. McCain, 12 Ala. 510 (1847); Pettit v. Pettit, 32 Ala. 288 (1858); Cothran v. McCoy, 33 Ala. 65 (1858).

A specific devise of realty does not affect its liability for debts. Speaking with reference to debts, not legacies, this section makes the realty of a decedent subject to their payment when the personalty is not sufficient. And such liability is not affected by a specific devise of the property. Kelly v. Richardson, 100 Ala. 584, 13 So. 785 (1893); May v. Burns, 222 Ala. 68, 131 So. 232 (1930); Cater v. Howard, 230 Ala. 133, 159 So. 830 (1935); Hammond v. Bibb, 234 Ala.192, 174 So. 634 (1937).

But before this liability attaches, both real and personal property, not specifically devised, shall be exhausted first. See Lightfoot v. Lightfoot, 27 Ala. 351 (1855); Morgan v. Watkins, 214 Ala. 671, 108 So. 561 (1926); Hammond v. Bibb, 234 Ala.192, 174 So. 634 (1937).

Title to the real property on the death of the decedent was held to be in the next of kin, subject to be divested by the administrator, as provided by this section and §§43-2-442 and 43-2-443. Little v. Gavin, 244 Ala. 156, 12 So.2d 549 (Ala.1943).

To prevent sale heir may use the same defenses decedent could have used. When an administrator asks for an order to sell lands for the payment of debts under this section the heir at law, as the party in adverse interest, may plead the statute of limitations, or set up any other defense which would be available to the decedent himself, if the action were against him while living. Warren v. Hearne, 82 Ala. 554, 2 So. 491 (Ala.1887).

Abatement of legacies where assets insufficient. See Powell v. Labry, 210 Ala. 248, 97 So. 707 (Ala.1923).

The devisees are the only necessary parties defendant to a petition for sale of the devised lands to pay debts. Williams' Devisees v. Williams' Adm'r, 49 Ala. 439 (Ala.1873).

Administrator cum testamento annexo was a proper party to maintain suit for slander of title because, even though title to the property passed to the devisees upon the death of prior owner, such passing was subject to the payment of debts and charges against the estate and administrator had duty imposed by law to sell realty to pay debts in the event the personal estate is insufficient to pay the debts. Proctor v. Gissendaner, 1978, 579 F.2d 876, supplemented 587 F.2d 182.

Where administration of estate was removed from probate court to circuit court, administratrix was removed along with proceedings to circuit court and was authorized to ask permission to proceed in circuit court with her petition filed in probate court for sale of lands for payment of debts of estate. And circuit court had no discretion as to whether to permit administratrix to proceed with petition to sell lands for payment of debts, or whether to allow Movant in original motion for sale to proceed, where such motion which was filed in circuit court prior to issue of letters of administration to administratrix was simply a motion for sale of lands for division among joint owners but motion did not trace title into joint owners. Ex parte Stephens, 233 Ala. 167, 170 So. 771 (Ala.1936).

§ 43-2-442. Authorization to sell -- In case of intestacy.

Duty is mandatory. The duty of an administrator to sell realty for payment of debts in case personalty is insufficient is "mandatory." Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (1941); Dorrough v. McKee, 264 Ala. 663, 89 So.2d 77 (1956).

When there are debts of an estate and the personalty is insufficient to satisfy said debts, it is mandatory that the administrator sell the lands of the estate to pay said debts. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (1957) Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (1962).

Administrator has only bare power. In regard to the sale of lands for payment of debts, an administrator or executor has only a bare power over the lands. Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (Ala.1962).

The existence of which depends upon necessity for its exercise. While by no act of the heir or devisee can the power of the administrator to sell be frustrated, the existence of the power itself depends upon the existence of the necessity for its exercise -- the payment of debts of the testator or intestate. Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (Ala.1962).

When the necessity of sale does not exist, as where the heirs are willing to pay all of the debts or charges against the estate, it would be unconscionable to allow the personal representative to disturb the possession of the heir or of the devisee or of the alienee of the one or of the other. Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (Ala.1962).

The administrator cannot be controlled by the heirs, nor take orders from them. The duty and responsibility is upon the administrator. Gilmore v. Roberson, 273 Ala. 230, 139 So.2d 604 (Ala.1962).

The right of an administrator to sell land to pay debts of his intestate is wholly statutory, and he alone can do so on the conditions and in the manner prescribed by this section. Austin v. Eyster, 242 Ala. 402, 6 So.2d 892 (1942) Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (1957).

If there was an original deficiency of personal assets for the payment of debts, then under the very terms of this section a sale of the realty is due as a matter of course, or, if these assets have become unavailing from depreciation or loss through no fault of the administrator or creditor, the realty may be sold, the result being the same as if there had been an original lack of personalty. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

And failure to sell realty may subject administrator to civil action. Failure of administrator to sell realty in order to pay debts in case the personalty is insufficient may subject administrator to civil action by a creditor of the estate, in order that the creditor may secure judgment against the administrator as such, attended with the consequence of being personally liable therefor if the judgment is allowed to stand and execution issued and returned "no property." Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

Or creditor may force a sale. Where there is insufficient personalty for payment of intestate's debts, the initial duty to sell the land devolves upon administrator, and if he arbitrarily fails to act upon reasonable demand or after reasonable length of time, creditor may force a sale of realty upon allegation and proof of such facts. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

Presumption where creditor reduces claim to judgment. The creditor may reduce his claim to a judgment and a presumption of a devastavit will arise against the administrator if the judgment is allowed to stand, but this will not estop the sureties on the bond from denying that such administrator had come into possession of assets with which to discharge the debts, and there being no devastavit in fact no action will lie against them. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

Realty of persons dying intestate in this state descends to the heirs at law

When decedent died intestate, the legal title to a one-half interest in his real property vested eo instante in his son; however, it vested subject to the statutory power of the administratrix to take possession of it and obtain an order to have it sold for payment of the debts of his father's estate. Pennington v. Bigham, 512 So.2d 1344 (Ala.1987).

Realty of persons dying intestate in this state descends to the heirs at law subject to the payments of debts in event personalty is insufficient for that purpose. Moebes v. Kay, 241 Ala. 294, 2 So.2d 754 (Ala.1941).

Personal representative may intercept possession of heirs. This section permits the personal representative to intercept and take possession of land from the heirs or their vendee, if a necessity exists therefor. Johnson v. Sandlin, 206 Ala. 53, 89 So. 81 (Ala.1921).

Heir at law could not maintain petition to sell lands belonging to intestate decedent for division during pendency of action by administratrix for leave to sell land to pay debts of deceased on ground

personal property was insufficient for that purpose. Austin v. Eyster, 242 Ala. 402, 6 So.2d 892 (Ala.1942).

One heir may purchase entire estate. Tenants in common are in a confidential relationship to each other by operation of law as to the joint property. And a cotenant cannot buy an outstanding adversary claim to the common estate and assert it for his exclusive benefit to the injury or prejudice of his co-owners. However, this rule does not prevent one heir from purchasing the entire estate at an administrator's sale for the purpose of subjecting the land to the payment of the debts of the decedent. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

Court is vendor. In an administrator's sale of deceased's lands to pay the debts of his intestate, the court is the vendor. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

Sufficiency of petition. A petition averring that the personal property of the estate is insufficient for the payment of debts, and that the sale of the land is necessary for that purpose is sufficient. Peavy v. Griffin, 152 Ala. 256, 44 So. 400 (Ala.1907). See also Cotton v. Holloway, 96 Ala. 544, 12 So. 172 (1892), wherein it is held that it is unnecessary to allege the amount of the debts or the value of the personalty, and overruling on this point, Abernathy v. O'Reilly, 90 Ala. 495, 7 So. 919 (1890), overruled on other grounds, Cotton v. Holloway, 96 Ala. 544, 12 So. 172 (1892). See also Garner v. Toney, 107 Ala. 352, 18 So. 161 (1895).

It is absolutely indispensable that the petition contain not only the above averment (insufficiency of personalty), but also the existence of debts. And unless it does this, the court is without jurisdiction and any decree rendered on the defective petition is a nullity even on collateral attack. Abernathy v. O'Reilly, 90 Ala. 495, 7 So. 919 (Ala.1890). See also Alford v. Alford, 96 Ala. 385, 11 So. 316 (1892) containing specific enumeration of the requisites of the petition. As to further contents of application, see §43-2-444 and notes thereto.

Personal representative of intestate decedent's estate was not entitled to receive personal representative fees in his action for sale for division of decedent's real property, which was separate civil action from administration of estate, inasmuch as personal representative's possession of real property was not needed for estate administration or for payment of debts, and therefore personal representative was not in possession or control of decedent's real property, so as to meet statutory requirements for fee, and services he performed did not benefit estate. Self v. Roper, 689 So.2d 139 (Ala.Civ.App.1996).

Debt of estate

Absent a timely claim against estate by mortgagee, real property that was inherited by intestate decedent's minor children subject to a mortgage could not be ordered by probate court to be sold to satisfy the mortgage because mortgage was not a debt of the estate. Schlumpf v. D'Olive, 203 So.3d 57 (Ala.2016).

§ 43-2-443. Authorization to sell -- Sale for division.

Initial procedure

Order of probate court for sale of land without written consent of adult heir or devisee was void. Forman v. McAnear, 219 Ala. 157, 121 So. 538 (1929); Dawkins v. Hutto, 222 Ala. 132, 131 So. 228 (1930).

Initial procedure. Under this section one or more of the adult heirs must become the actor by filing a written consent to the sale, whereas the duty to sell the lands where there is insufficient personalty to pay the debts is mandatory. Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (Ala.1924).

Petition may be filed by administrator together with one or more heirs. A petition contemplating a sale of real estate for division among the joint owners, including a distribution among the heirs of an intestate, may properly be filed by the administrator, together with one or more of the heirs of the intestate. McGowin v. Robinson, 251 Ala. 690, 39 So.2d 237 (Ala.1949).

Priority of proceeding for division under § 35-6-20

An action to sell land for distribution under §35-6-20 does not have priority over an action under this section. Autry's Estate v. McDonald, 332 So.2d 377 (Ala.1976).

Priority of proceeding for division under § 35-6-20. In a proceeding under § 35-6-20, wherein the heirs filed a complaint to sell lands of intestate for division, a plea in abatement (now motion to dismiss) by administrator which alleged that a petition had been filed in probate court by the administrator upon the request of an adult heir to sell the real estate for distribution among the heirs was insufficient where it appeared that lands of the intestate were not needed to pay the debts of the estate or costs of administration and the time for filing claims against the estate had expired, since to hold otherwise would give the administrator under this section, rights prior to those conferred upon the heirs at law under the provisions of § 35-6-20, contrary to legislative intent. Dorough v. McKee, 264 Ala. 663, 89 So.2d 77 (Ala.1956).

Lands in which decedent held equitable interest may be sold. Under this section the probate court has jurisdiction to sell for division lands in which the decedent held only an equitable interest. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (Ala.1892).

Intestate must have title at death. Under this section the probate court has no jurisdiction to order the sale of land, the title to which intestate did not have at the time of his death, but which was taken after his death, in the name of the heirs, by the administrator who paid the balance of the purchase price out of the funds of the estate. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (Ala.1892).

Averment as to seisin held sufficient. The supreme court has held sufficient an averment that decedent died seised and possessed of the following described real estate, to wit "certain interests and rights not definitely known to your petitioner.." Rucker v. Tennessee Coal, Iron & R. Co., 176 Ala. 456, 58 So. 465 (Ala.1912).

Decree is not subject to collateral attack for irregularities. The decree ordering sale under this section cannot be collaterally attacked because of irregularities, such as the omission of the name of any of the heirs, the court being one of general jurisdiction in regard to those matters. Conniff v. McFarlin, 178 Ala. 160, 59 So. 472 (Ala.1912).

§ 43-2-444. Application for sale.

Purpose of this section. The purpose of this section is to require such a description of the land in the application that a decree can be rendered therein that will be so exact and accurate that a purchaser at a

sale thereunder will know from the proceedings just what land he bought. Little v. Marx, 145 Ala. 620, 39 So. 517 (Ala.1905).

Filing of application by administrator is mandatory. Unless the application is filed by the executor or administrator the probate court acquires no jurisdiction. Bolen v. Hoven, 143 Ala. 652, 39 So. 379 (Ala.1905).

And such application should be filed within 20 years. Where one of several heirs has been in the possession of lands of a decedent for 20 years, holding adversely, notoriously and exclusively, by independent claim of right in himself, the application for a sale for distribution among the heirs authorized by this section should not be granted, although the statute does not, in terms, limit the time within which application must be made. Bozeman v. Bozeman, 82 Ala. 389, 2 So. 732 (Ala.1887).

Insufficiency of personalty is a jurisdictional fact. This section, it will be noticed, does not, ex vi termini, require an allegation in the petition that the personal property belonging to the decedent's estate is insufficient for the payment of debts, and in construing it the supreme court has held that on direct attack by appeal the proceeding is in personam, but on collateral attack it is to be regarded as in rem. But in view of former § 43-2-449, it is manifest that the insufficiency of personal property for the payment of the debts of the estate is the jurisdictional fact upon the existence of which the right and power of sale in such cases is made to depend. Cotton v. Holloway, 96 Ala. 544, 12 So. 172 (Ala.1892).

A purchaser of a homestead from the widow is a party interested in the estate, within the meaning of the last clause of this section, and this is true although at the time of the purchase said property had not been set apart to the widow as a homestead. Newell v. Johns, 128 Ala. 584, 29 So. 609 (Ala.1901).

Hence, he cannot maintain an action to enjoin the sale, but must pursue his remedy by contesting the application hereunder. Spear v. Banks, 114 Ala. 323, 21 So. 834 (Ala.1897).

Sufficiency of description of lands

In Alvarez v. Warner, 201 Ala. 50, 77 So. 344 (Ala.1917).

But was sufficient in Alvarez v. Warner, 201 Ala. 50, 77 So. 344 (Ala.1917).

The description was insufficient in Rucker v. Tennessee Coal, Iron & R. Co., 176 Ala. 456, 58 So. 465 (Ala.1912).

An application describing certain lands by metes and bounds and seeking to sell all such lands, "except 150 acres thereof deeded by A. to B." on a certain date, but which does not describe or identify the land so deeded, is insufficient. Little v. Marx, 145 Ala. 620, 39 So. 517 (Ala.1905).

Sufficiency of description of lands. Jurisdiction in a proceeding under this section is founded on the petition, and it does not attach where the land is not described with sufficient certainty. Kornegay v. Mayer, 135 Ala. 141, 33 So. 36 (Ala.1902).

Failure to indicate with any degree of accuracy the section, township and range in which the lands are located invalidates the petition. Henley v. Johnston, 134 Ala. 646, 32 So. 1009, 92 Am.St.Rep. 48 (Ala.1902).

Petition must show residence and status of heirs. It is reversible error where the petition fails to state the places of residence of heirs as herein required, and whether they are minors or married women. Bozeman v. Bozeman, 82 Ala. 389, 2 So. 732 (Ala.1887).

Answer of heir or devisee is appropriate to contest application. Under this section formal pleadings are not required nor practiced and the answer of the heir or devisee is sufficient if it denies the existence of the debts for the payment of which the land is sought to be sold. Little v. Marx, 145 Ala. 620, 39 So. 517 (Ala.1905). See also Alvarez v. Warner, 201 Ala. 50, 77 So. 344 (1917).

Trial court did not have to include estate indebtedness in its determination of executor's fees, where executor did not file complaint. Ruf v. Ruf, 769 So.2d 923 (Ala.Civ.App.1999), certiorari quashed.

§ 43-2-445. Notice and hearing generally; time for hearing; appointment of guardian ad litem.

Lack of notice. The failure to give notice as herein prescribed will not render the proceedings void on collateral attack. Lyons v. Hamner, 84 Ala.197, 4 So. 26, 5 Am.St.Rep. 363 (Ala.1888) This because the proceedings are in rem. See on this point notes to §43-2-441.

§ 43-2-450. Order of sale for payment of debts.

Land may be sold only when personal property insufficient. The lands of a decedent can be ordered sold only when the personal property in the estate is insufficient to pay the debts or for division. Cox v. U. S., 1970, 421 F.2d 576.

Sale must be of decedent's entire interest in parcel sold. The legislature intended by this section and §43-2-464 to empower the judge of probate to sell a part or parcel of the realty of a decedent's estate when the debts owed by the estate were not enough to require the sale of all the realty owned by the deceased at the time of his death, but the judge of probate can only authorize the sale of the entire interest which the decedent had in that part or parcel to be sold. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

Court may not sell lands reserving mineral interest. The probate court was without statutory authority to sell the lands reserving the mineral interest to the heirs. Smith v. Smith, 266 Ala. 118, 94 So.2d 863 (Ala.1957).

Article 20. Probate Procedure Act.

§ 43-2-830. Devolution of estate at death; restrictions.

Personal representative of intestate decedent's estate was not entitled to receive personal representative fees in his action for sale for division of decedent's real property, which was separate civil action from administration of estate, inasmuch as personal representative's possession of real property was not needed for estate administration or for payment of debts, and therefore personal representative was not in possession or control of decedent's real property, so as to meet statutory requirements for fee, and services he performed did not benefit estate. Self v. Roper, 689 So.2d 139 (Ala.Civ.App.1996).

In determining amount of fee to be paid to executor of decedent's estate, trial court was not required to consider amounts paid for certain tracts of land, where possession and control of money received for those tracts were not necessary for purposes of administration of estate or payment of indebtedness. Ruf v. Ruf, 769 So.2d 923 (Ala.Civ.App.1999), certiorari quashed.

When a prospective vendee under a contract for the purchase of real property dies before the contract is fully executed, the contractual rights of the prospective vendee are, themselves, treated as real property under the doctrine of equitable conversion. Gartman v. Hill, 874 So.2d 555 (Ala.Civ.App.2003), rehearing denied.

Absent a timely claim against estate by mortgagee, real property that was inherited by intestate decedent's minor children subject to a mortgage could not be ordered by probate court to be sold to satisfy the mortgage because mortgage was not a debt of the estate. Schlumpf v. D'Olive, 203 So.3d 57 (Ala.2016).

Husband's minor daughter had interest in personal property comprising estate of husband's grandmother and was so situated that disposition of divorce proceeding might as practical matter impair or impede her ability to protect her interest, and her interest as to such property was not adequately represented by existing parties in divorce proceeding, as required to justify her intervention in divorce proceedings irrespective of timeliness of motion to intervene, where minor daughter was beneficiary of estate, of which husband was executor. Gunter v. Gunter, 911 So.2d 704 (Ala.Civ.App.2005).

§ 43-2-835. Duty of personal representative; inventory and appraisement.

Filing of inventory

Any provision of a will purporting to exempt the personal representative from filing an inventory must specifically speak to that requirement. Green v. Estate of Nance, 971 So.2d 38 (Ala.Civ.App.2007).

§ 43-2-843. Transactions authorized for personal representatives; exceptions.

Statute providing authority to administrator of estate to transfer property did not apply to deed of distribution dated more than three months before the date on which statute became effective. Reese v. Harris, 772 So.2d 1193 (Ala.Civ.App.2000).

Under Alabama law, personal representative has power to exercise the same power over property of probate estate that an absolute owner would have. In re Eldridge, 348 B.R. 834 (Bkrtcy.N.D.Ala.2006).

Wrongful death action brought by decedent's son was a nullity, and therefore, personal representative could not be substituted as plaintiff, despite son's contention that personal representative appointed him as agent to bring the action; only personal representative was authorized to bring wrongful-death action, statute allowing personal representative to delegate tasks only applied to acts of administration, and filing wrongful-death action was not an act of administration. Ex parte Bio-Medical Applications of Alabama, Inc., 216 So.3d 420 (Ala.2016).

Personal representative of property owner's estate had the power to consent to town's annexation of the estate property, and, thus consent obtained from the personal representative satisfied statutory requirement that all owners of property consent to annexation of the property; town was not required to obtain the consent of property owner's heirs in order to annex the property. Town of Elmore v. Town of Coosada, 957 So.2d 1096 (Ala.2006), rehearing denied.

§ 43-2-844. Transactions authorized for personal representatives; prior court approval.

Personal representative of property owner's estate had the power to consent to town's annexation of the estate property, and, thus consent obtained from the personal representative satisfied statutory requirement that all owners of property consent to annexation of the property; town was not required to obtain the consent of property owner's heirs in order to annex the property. Town of Elmore v. Town of Coosada, 957 So.2d 1096 (Ala.2006), rehearing denied.

Payment of compensation to personal representative

Claim by daughters of deceased seeking interest from personal representatives for compensation payments made by personal representatives to themselves prior to obtaining court approval in estate administration was not barred by equitable estoppel, where, in making payments to themselves without obtaining prior court approval, the personal representatives violated their statutory duty, and estate-tax return received by daughters described the amount the personal representatives intended to claim as compensation, not amount they have already paid themselves. Wehle v. Bradley, 195 So.3d 928 (Ala.2015).

Any error in co-executors' paying themselves compensation for ordinary services in the amount of \$800,000 without prior approval of probate court was remedied when the probate court issued its final award, after taking into consideration the statutory factors, and then crediting the amount co-executors had paid themselves against the total fee of \$1,165,937 awarded for ordinary services. Ruttenberg v. Friedman, 97 So.3d 114 (Ala.2012).

Although provisions of deceased's will might have granted broad discretion to a personal representative in distributing property under the will, they did not specifically speak to the requirement that the personal representatives obtain the approval of the probate or circuit court before paying compensation to themselves; therefore, those provisions did not satisfy the statutory requirement that there be an express provision authorizing the payment of such fees without court approval, and thus, representatives were required to obtain court approval before receiving compensation. Wehle v. Bradley, 49 So.3d 1203 (Ala.2010).

Personal representatives were required to pay interest to estate on compensation payments made by personal representatives to themselves without prior court approval in estate administration, where a personal representative who used any of the funds of the estate for his own benefit was statutorily accountable for any profit made thereon or legal interest, a personal representative was required to pay interest from the date he or she paid himself or herself compensation without court approval to the date he or she obtained court approval for the compensation amount at issue, and the legislature had clearly indicated its disapproval of compensation payments made to personal representatives without prior court approval. Wehle v. Bradley, 195 So.3d 928 (Ala.2015).

§ 43-2-848. Compensation of personal representative.

Amount of commission

Compensation of \$1,964,367.82 to personal representatives in estate administration was reasonable, where the estate was valued at more than \$35,000,000 at time of deceased's death, estate contained some unusual assets, including competition-trained hunting dogs, partial ownership interests in thoroughbred horses, and artwork, estate included business entities owned by deceased, estate plan incorporated multiple trusts, there was evidence that deceased desired personal representatives receive "the 5% maximum" for their services, total receipts of the estate (assets and income during administration) through the time of final settlement were \$40,477,724.08 and the total disbursements were \$40,452,262.23, and maximum statutory fee trial court could have awarded the personal representatives was \$2,023,249.66. Wehle v. Bradley, 195 So.3d 928 (Ala.2015).

Personal representative of intestate decedent's estate was not entitled to receive personal representative fees in his action for sale for division of decedent's real property, which was separate civil action from administration of estate, inasmuch as personal representative's possession of real property was not needed for estate administration or for payment of debts, and therefore personal representative was not in possession or control of decedent's real property, so as to meet statutory requirements for fee, and services he performed did not benefit estate. Self v. Roper, 689 So.2d 139 (Ala.Civ.App.1996).

Judgment of the trial court fixing the compensation due temporary executor of estate at \$2500 was affirmed where there was evidence that he rendered no extraordinary or special services and that the value of the estate was \$50,000. Tyson v. Tyson, 604 So.2d 353 (Ala.1992).

Executrix was entitled to compensation of \$925.58 for services rendered to estate, even though executrix had originally requested \$5,800.00 in fees; statute limited compensation to "two and one-half percent of the value of all property received and under the possession and control of the personal representative and two and one-half percent of all disbursements," the total of all the property in the estate was \$18,511.46, two and one-half percent of \$18,511.46 was \$462.79, and the figure was doubled to account for both property received and disbursements. Cashion v. Torbert, 885 So.2d 745 (Ala.2003), rehearing denied, certiorari denied 125 S.Ct. 153, 543 U.S. 827, 160 L.Ed.2d 42.

Failure of decedent's mother to appeal trial court's judgment awarding a fee to personal representative of decedent's estate in probate proceeding out of proceeds of wrongful-death action for rendering of extraordinary services rendered judgment binding on mother, even though decedent's father appealed judgment. Rodgers v. McElroy, 153 So.3d 814 (Ala.Civ.App.2014).

Statutes governing a personal representative's fee for ordinary services and for extraordinary services are the exclusive statutory authorizations for determining a personal representative's compensation. Ex parte Rodgers, 141 So.3d 1038 (Ala.2013), rehearing denied, on remand 141 So.3d 1046.

The extent to which an executor should be compensated rests in the sound discretion of the court and is to be determined in view of all the circumstances of the case. Ruttenberg v. Friedman, 97 So.3d 114 (Ala.2012).

APJA Winter Conference 2019
Judge Patrick H. Davenport, Houston County Probate Judge
Case law related to selected statutes from Articles 16, 17, and 20.

§ 43-2-851. Bond.

Probate court must, unless waived by the terms of the will, require a personal representative to post a bond. Thames v. Thames, 183 So.3d 168 (Ala.Civ.App.2015).

Sufficiency of bond

Decedent's children, objecting to decedent's widow's appointment as personal representative of decedent's estate after executor named in will declined to serve, failed to establish that bond posted by widow was insufficient; children made no attempt to demonstrate through calculations the alleged insufficiency of the bond, and probate court was authorized to increase or reduce the bond required at any time. Thames v. Thames, 183 So.3d 168 (Ala.Civ.App.2015).

Checklist for Sale of Real Property

Relevant Code Section: § 43-2-440 et seq.

Requirements:

- ☐ Notarized Petition

Petition includes the following:

- ☐ Petitioner is Personal Representative
- ☐ Petition specifies reason for sale: 1) Division ____ or 2) Payment of debts ____
- ☐ Accurate description of the property
- ☐ Names of all heirs or devisees, including minors (if any)
- ☐ Addresses of all heirs or devisees
- ☐ Statement that value of personal property is insufficient to pay debts

Documents to be filed with Petition to Sell Real Property:

- ☐ If sale is for division, consent from an adult heir or devisee

Things to consider:

Are there claims against the estate?

Y / N

If yes, have claims been satisfied?

Y / N / n/a

Are we beyond the 6 month claims period?

Y / N

Other important information:

If sale granted – bond must be increased.

If sale is for payment debts – notice of petition must be published or posted.

If sale is for division, there must be more than one heir/devisee.

The following documents must be filed and entered after the sale of the real property:

- i. Report and Examination of Sale (§ 43-2-459)
 - a. Must be filed within 30 days of the sale
- ii. Order Confirming Sale (§ 43-2-462)
 - a. Must be entered 10 days after the Report is filed

Checklist for Sale of Personal Property

Case Matter Name/ Number: _____ **Date:** _____

§ 43-2-410. Power of sale conferred.

Any part of the personal property of a decedent, including land warrants and choses in action, may be sold only by order of the court, on the written application of the executor or administrator, verified by affidavit, in the following cases, unless, in such cases, power to sell is conferred by the will:

- ____(1) For the payment of debts.
- ____(2) To make distribution among the distributees or legatees.
- ____(3) To prevent the waste or destruction of property liable to waste, or of a perishable nature, if it is proved that the sale would be beneficial to the *estate*.

§ 43-2-411. Notice of application.

Notice of such application must be given to some person adversely interested in such manner, and for such length of time, not less than three weeks, as the judge of probate may require; but when the property is perishable, and it is so specified in the application, no notice is required if the judge is satisfied of the truth of the allegations contained in the application.

§ 43-2-413. Notice of sale.

When the application is granted for the sale of any personal property, the executor or administrator must give notice of the day, place and terms of sale, and a description of the property to be sold, by advertisement for three successive weeks in some newspaper published in the county where the sale is to take place, or, by posting notice at the courthouse door and at three other public places in the county. But when the property is perishable, or the expense of keeping it is very great, the sale may be made after five days' notice, which may be given by one insertion in a newspaper published in the county where the sale is to take place, or, if there be no such paper, by posting at the courthouse door, and at three other public places in the county. In addition to the notice prescribed in this article, the court may direct the giving of notice by printed handbills, or posters, to be distributed and posted in the manner best calculated to give extended notice of the sale.

Checklist:

- ____ filed by executor or administrator
- ____ notarized petition

Sale must be for one of the following:

- ____ Payment of debts
- ____ To make distribution among distributees or legatee
- ____ To prevent the waste or destruction of property liable to waste, or of perishable nature
 - **If this is the reason for the sale, pass to the file to Judge and ask him if he would like to waive the notice requirements and grant order immediately, as authorized by 43-2-411.**

Prepared by: _____